90-1219

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.
UNITED STATES SUPREME COURT
(1990 TERM)

FRED J. TOCCO
Petitioner

v.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING,

Respondent

and

TOWNSHIP OF CHERRY HILL,

Respondent.

PETITION FOR CERTIORARI
FROM A FINAL DECISION OF THE NEW JERSEY
SUPREME COURT (1990 TERM)

BRANDT, HAUGHEY, PENBERTHY,
LEWIS & HYLAND, P.A.
240 West Route 38
Moorestown, NJ 08057

On the Petition:
S. David Brandt, Esq.
Patrick F. McAndrew, Esq.

QUESTION PRESENTED FOR REVIEW

Whether a temporary taking has occurred under the Fifth Amendment of the United States Constitution, so as to require the payment of just compensation, under the following circumstances:

- The use of Petitioner Fred J. Tocco's undeveloped land was completely frozen for eighteen months by order of a state administrative agency;
- The administratively-imposed freeze was implemented through no fault of Tocco, but to help a municipality meet the municipality's obligation under New Jersey law to provide affordable housing as cheaply and economically as possible for the municipality;
- The freeze had no environmental basis. To the contrary,the freeze

was imposed because Tocco's land was free of environmental limits and prime for development;

- The freeze not only precluded any beneficial use of Tocco's land for eighteen months but also prevented Tocco from even obtaining municipal land use approvals — in direct violation of New Jersey statutes governing land use applications to municipal boards;
- The administratively-imposed freeze violated New Jersey statutes prohibiting land development moratoriums and was contrary to New Jersey Supreme Court precedent prohibiting temporary takings without compensation;
- The freeze was implemented without as much as one penny of compensation to Tocco.

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[1] The names of all parties appear in the caption so they are not listed separately. See S. Ct. R. 14.1(b).

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OPINION BELOW

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GROUNDS FOR JURISDICTION

i. Judgment to be Reviewed – Decision of the New Jersey Supreme Court, filed October 22, 1990, (Pa1) denying certification to lower State Court decisions.

ii. The case involves a "taking claim" arising under the United States Constitution, V Amendment. This provision is applicable to the states under the XIV Amendment.

iii. This Court has jurisdiction under 28 U.S.C. §1257:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may

be reviewed by the Supreme Court by writ of certiorari...where any title, right, privilege or immunity is specially set up or claimed under the Constitution...."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, which provides in relevant part:

> "...[N]or shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The facts in this case are undisputed. The New Jersey Courts acted on Crossmotions for Summary Judgment; the critical facts were specifically stipulated.

This litigation has its roots in matters which have absolutely nothing to do with Petitioner Fred J. Tocco ("Tocco") – the New Jersey judiciary's quest for affordable housing in New Jersey.

The quest began with the historic decisions of the New Jersey Supreme Court which held that the State Constitution mandated that each municipality in New Jersey provide, through its local zoning code, a realistic opportunity for the construction of low and moderate income affordable housing. See Southern Burlington County N.A.A.C.P. v. Mount

Laurel Township, 67 N.J. 151, 336 A.2d 713, cert. denied 423 U.S. 808, 46 L.Ed.2d 28 (1975) and Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 456 A.2d 390 (1983) (collectively, sometimes referred to as the Mt. Laurel decisions).

Following the Mt. Laurel decisions, an exclusionary zoning law suit was filed against Cherry Hill Township ("Cherry Hill"), a New Jersey Municipality and the Third Party Defendant herein, by Fair Share Housing Center, a non-profit organization, and by other interested parties. The goal of that suit was to remedy Cherry Hill's historical failure to provide affordable housing by ending Cherry Hill's exclusionary zoning practices and formulating a "compliance plan."

Also following the Mt. Laurel decisions, the New Jersey Legislature adopted the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301, in 1985. In adopting the Act, the New Jersey Legislature specifically stated it was reacting to the mandate of the Mt. Laurel decisions. See N.J.S.A. 52:27D-302. A State agency, the Council on Affordable Housing ("COAH") (the Defendant herein), was created in order to form compliance plans. COAH's mission was, acting with municipalities throughout the State, to insure that local zoning codes would provide a realistic opportunity for affordable housing and to address the historical failures of municipalities to provide this opportunity. Upon the adoption of the Fair Housing Act and the creation of COAH, the exclusionary law suit brought by Fair Share Housing Center against Cherry Hill

was transferred from the Superior Court of New Jersey to COAH.

While that law suit inched forward in COAH's administrative setting and while the parties (which did not include Tocco) attempted to resolve Cherry Hill's fair share housing obligations and how those obligations would be fulfilled, an Administrative Order (Pa54 et seq.) was entered by COAH on April 24, 1987. This Administrative Order prohibited Cherry Hill from granting any development approvals for vacant land in excess of two acres. It is this Administrative Order which effected the taking of Tocco's property. The Order issued by Defendant COAH, an executive administrative agency, says in part:

> "ORDERED that the Township of Cherry Hill, the Township of Cherry Hill Planning Board, Board of Adjustment and Zoning Board and any other person, agent or employee who has the

> authority to grant any type of development approvals are hereby restrained from granting any type of development approval for the development of any parcel of land of two acres or more in size...."

Although not a party to the ongoing litigation, Tocco was immediately affected by the Administrative Order. Tocco is a New Jersey citizen who owns a 140 acre tract of property in Cherry Hill Township, New Jersey, commonly called "Short Hills Farm." Tocco's intentions for the property were simple – to develop it in accordance with the Cherry Hill Township zoning and subdivision codes and New Jersey's Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL").

The effect of COAH's Administrative Order on Tocco was devastating. While COAH, the Township, and the other litigants in the exclusionary zoning case were attempting to devise a compliance

plan and bring the suit to a resolution,[2] Tocco was moving forward and preparing applications for the development of Short Hills Farm in accordance with the local land use codes and the MLUL. Almost simultaneously with the issuance of the COAH Administrative Order, Tocco was submitting his application for development on April 21, 1987 to the Cherry Hill Township Planning Board ("Board") for preliminary subdivision approval.

A public hearing was held by the Board on June 15, 1987. But, because of the Administrative Order issued by COAH, no action was taken by the Board. Tocco's development application was shelved. The Administrative Order issued

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[2] For the record, the parties to that litigation are still attempting to find a resolution. A compliance plan has yet to be worked out by COAH, Cherry Hill Township and the other litigants.

by COAH therefore prevented Tocco from obtaining preliminary subdivision approval for his development within the 95-day time frame mandated by the New Jersey Legislature in the MLUL; it also prevented Tocco from obtaining the vested rights which a developer automatically receives upon the granting of preliminary subdivision approval.[3] The Administrative Order kept Tocco's land in its vacant, undeveloped state, while Cherry Hill Township, COAH and the other litigants wrestled with the fate of Cherry Hill's compliance plans for affordable housing.

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[3] The MLUL requires that a municipal agency act upon an application for preliminary subdivision within 95 days. N.J.S.A. 40:55D-48(c). COAH's administrative order violated this legislative mandate and prevented Tocco from obtaining three year's of protection for the terms of approval. N.J.S.A. 40:55D-49(a). The MLUL also prohibits land development moratoriums, subject to limited health and safety exceptions not applicable here. N.J.S.A. 40:55D-90.

At the outset, the COAH Order was of unlimited duration. It was designed to preserve vacant land within Cherry Hill Township, deemed to be a "scarce resource" by COAH, so that Cherry Hill could satisfy its State constitutional affordable housing obligation as cheaply as possible. Faced with this open-ended restraint, Tocco submitted a Motion to COAH on January 29, 1988 to exempt Short Hills Farm from the Administrative Order. That request was denied on May 2, 1988 and the Order therefore continued in full force and effect, unlimited in duration.

Tocco did not file a direct appeal of the COAH denial since that appeal would have focused on whether the COAH Order was arbitrary or capricious, and not on the constitutional taking issues. The COAH Order is probably not arbitrary and capricious since it seems rather

calculated and indeed effective in achieving its purposes of preserving vacant land for Cherry Hill's benefit.

Tocco was concerned solely with the effect of the Order, so the remedy he pursued was the within claim against COAH for inverse condemnation, which can be filed under New Jersey law only in the Superior Court of New Jersey, Law Division. See Schiavone Const. Co. v. Hackensack, 98 N.J. 258, 486 A.2d 330 (1985); Orleans Builders and Developers v. Byrne, 186 N.J. Super. 432, 446, 453 A.2d 200 (App. Div.) cert. denied 91 N.J. 528 (1982); N.J.S.A. 20:3-5. Defendant COAH, who imposed the freeze for Cherry Hill's benefit, joined Cherry Hill as a Third Party Defendant in this case, requesting indemnification.

The COAH Administrative Order was eventually modified[4] by the trial Court in this matter, per the Honorable L. Anthony Gibson, J.S.C.[5], after the administrative freeze had been in effect for one and one-half years. Thus, what started out as an open-ended freeze, turned out to be a one and one-half year freeze as a practical matter.

During that time, the Township negotiated, mediated, contemplated and litigated with COAH and the other participants in the affordable housing exclusionary zoning case over how the Township would meet its fair share obligation.

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[4] Even as modified, the restraints were continued and portions of Short Hills Farm remain subject to restraints as of this writing.

[5] Judge Gibson is one of three trial judges specially designated by the New Jersey Supreme Court to hear all cases in the State arising under the Mt. Laurel doctrines.

While this occurred, Tocco could not use his property or obtain any development approvals. All Tocco could do was spend significant sums of money to carry his property and wait to see the outcome of COAH and Cherry Hill's protracted dispute.

Tocco's inverse condemnation Complaint was eventually dismissed by Judge Gibson on July 7, 1989, acting on Cross-motions for Summary Judgment on stipulated facts (Pa18 et seq.). The Appellate Division of the New Jersey Superior Court affirmed in a written decision (Pa3 et seq.). In an Order (Pa1) filed October 22, 1990, the New Jersey Supreme Court declined to grant certification of the Appellate decision and let the lower Court rulings stand.

Tocco's Fifth Amendment taking claim is the principal claim in this litiga-

tion. It was raised on the face of his State Court Complaint (see Verified Complaint, ¶6 (Pa48)) and briefed throughout the proceedings below.

ARGUMENT

Special and important reasons exist for granting this Writ of Certiorari.

First, the taking issue is a significant constitutional taking issue which has long bedeviled citizens and the courts. Because of concerns about ripeness and other procedural issues, defining when regulation crosses the line and becomes a taking, permanent or otherwise, has proven elusive. See e.g., Agins v. Tiburon, 447 U.S. 255 (1980); San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621 (1981); and Williamson Planning Comm'n. v. Hamilton Bank, 473 U.S. 172 (1984). Even in the case of First English Evan. Luth. Church v. Los Angeles Cty., 482 U.S. 304 (1987), where this Court decided only that compensation is available for a temporary taking, a decision was not made on when a temporary

taking occurs and the matter was remanded to the State Court for further consideration.

Tocco's plight offers this Court a great opportunity for delineating when a temporary taking occurs under Federal law. The case is simple, the facts are undisputed since they were stipulated below, and the lower Court decisions are final. State remedies were pursued to exhaustion – both literally and figuratively. Moreover, this case is not clouded by grave environmental concerns – Tocco's use of his land and his ability to seek development approvals was frozen, not because his land was environmentally limited or sensitive, but because Short Hills Farm was ideal for development. If this Court truly wishes to draw a line to illustrate where takings occur, a cleaner

canvas than this case could not be imagined.

Second, granting the Writ is also necessary in the interest of fundamental fairness and to grant Tocco meaningful judicial review. The New Jersey Courts did not fulfill the judiciary's traditional role of protecting individual rights from legislative or executive over-reaching.

In many instances, government officials such as local mayors must provide necessary municipal services and improvements within limited budgets. It is very tempting to make developers pay for those improvements and services even though the proposed development has no connection to the service or improvement. It is thus not at all unusual for a state or federal court to review the following situation: a local mayor, desiring a new traffic

light and acting with the very best of intentions, "requests" that a developer put in that new light. Even if the traffic light has been needed by the municipality for many years, the temptation is often very great for the mayor to ask the developer to pay the full bill. It is a temptation born of convenience, good intentions and sometimes local necessity. The developer in these situations often gives in simply because the developer needs its approvals and needs to move on with its financing and development; litigation is not a realistic, economic option. In cases where litigation is pursued, however, the developer looks to the court system for fundamental fairness and meaningful review.

In this particular case, the New Jersey court system in a sense became the mayor and was asked to do the impossible

– to police itself. The "war" for affordable housing in New Jersey has been started and waged in large part by the State judiciary. Had there been no Mt. Laurel decisions, there would be no COAH and none of the litigation which forms the subject matter of this case, either directly or indirectly, would have ever taken place.

Having defined the ends, i.e., affordable housing, it is difficult for New Jersey Courts to objectively and fairly assess the means to accomplish those ends. It is akin to asking the mayor of a small town whether it is fair to extract a long-needed traffic light from a large developer. We do not quarrel with the worthiness of the end – affordable housing is a legitimate public goal and it is a worthy objective. The issue here is whether the means of freezing the use

and development of Tocco's property for the benefit of Cherry Hill Township is a fair burden to place solely on the shoulders of Tocco.

New Jersey Courts are peculiarly unsuited to address this issue since, having set the agenda and goals, they have a real stake and interest in seeing that the goals are accomplished. These inherent limitations are reflected in the decisions below and in related cases.

The paradox of New Jersey Courts reviewing the means used to achieve affordable housing was reflected in Judge Gibson's trial decision herein. The restraint imposed by COAH had been renewed by the trial Court, albeit in modified form, in its own injunction. Thus, if Judge Gibson found COAH's Order effected a taking, the same might be true of the trial Court's own subsequent in-

junction – a fact alluded to by the trial Court. See Trial Court Transcript, (Pa28-Pa29).

The intermediate New Jersey Appellate Court upheld the trial Court's ruling and illogically condoned the one and one-half year deprivation of use and development inflicted on Tocco because Tocco did not stand alone. Several other developers were similarly situated and affected. The Appellate Division of the Superior Court of New Jersey ruled, in effect, that a taking might have occurred had Tocco been singled out. But since several people may have had their constitutional rights curtailed, a taking did not result. The apparent lesson to be learned is that constitutional misery likes company and if government is to engage in constitutional violations it should do it on a whole-scale basis.

In addition to the Appellate Division's bizarre ruling, the New Jersey Supreme Court declined Tocco's petition for certification even though the eighteen month deprivation of use was squarely prohibited by a decision of the New Jersey Supreme Court issued in 1968, entitled Lomarch v. Englewood, 51 N.J. 108 (1968). In Lomarch, the New Jersey Supreme Court held that a municipality could not freeze the use of a developer's land for even one year in order to determine if it would be utilized for a street or other public purposes, unless compensation was paid. In declining to review the Appellate Division's decision in this case, the New Jersey Supreme Court elected to ignore its own precedent in Lomarch and elected to ignore the doctrine of stare decisis.

Just how far New Jersey Courts will go in their efforts to achieve the judicially imposed goal of affordable housing was recently revealed in Holmdel Builders Association v. Township of Holmdel, et al, ___ N.J. ___ (1990). That case was concerned with impact fees which were being imposed by municipalities across New Jersey in an effort to collect money from developers so that the municipalities could build affordable housing and cure the municipality's historical fair share housing deficiencies. Since developers were being singled out to pay for public programs in the form of affordable housing, which were no different in theory than the public's need for new schools or new roads, it was believed that the impact fees would be subject to a traditional rational nexus requirement between the proposed development and the exac-

tion. This Court, of course, most recently reviewed and applied the traditional rational nexus requirement between development and exactions in Nollan v. California Coastal Com'n., 483 U.S. 825 (1987).

In the Holmdel Builders Association case, however, the New Jersey Supreme Court specifically held "that the rational-nexus test is not apposite in determining the validity of inclusionary zoning devices generally or of affordable housing development fees in particular." __ N.J. at __ (Slip Opinion, p.27). Rather than ask whether the exaction of an impact fee was fair, the Court asked whether it was efficient. See id. By refusing to apply the traditional rational nexus test in Mt. Laurel litigation, the New Jersey Supreme Court is essentially saying it is all right to single

out certain people to pay for affordable housing, in one form or another, so long as the goal for affordable housing is achieved. Any meaningful inquiry into fairness was avoided. The ends will, according to the New Jersey judiciary, justify the means.

CONCLUSION

In sum, granting the Writ of Certiorari in this case is appropriate because the Court is presented with a unique chance. It is a chance to delineate when temporary takings occur and to provide guidance to courts, regulators and citizens on these significant public issues. It is important that public goals be achieved; it is just as important that they be fairly achieved.

The New Jersey Courts are unusually ill-equipped in this particular instance to assess fairness of the means. Usual-

ly, the Legislature or the Executive Branch selects the goals and the judiciary reviews the means for fairness and appropriateness. In this instance, the New Jersey Courts, much like the mayor in a small town seeking to obtain public services and improvements within a limited budget, is blinded by its own agenda and by goals fashioned by its own hand.

It is certainly important that the goal of affordable housing be achieved. But why Fred Tocco should be forced to bear a unique exaction – the dedication of his land as essentially open space for a year and a half and a prohibition on him even obtaining any local development or approvals for a year and a half – remains a mystery.

We therefore respectfully request that this Court grant the within Petition, reverse the State Courts below, and

afford Tocco just compensation for the temporary taking which clearly took place in this case.

BRANDT, HAUGHEY, PENBERTHY,
LEWIS & HYLAND, P.A.

By S. David Brandt
S. DAVID BRANDT

Dated: 1/28/91

On the Petition:
Patrick F. McAndrew, Esq.

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90-1219 (2)

Supreme Court, U.S.
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CASE NO.
UNITED STATES SUPREME COURT
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FRED J. TOCCO
Petitioner

v.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING,

Respondent

and

TOWNSHIP OF CHERRY HILL,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI FROM A FINAL DECISION OF THE NEW JERSEY SUPREME COURT (1990 TERM)

BRANDT, HAUGHEY, PENBERTHY,
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240 West Route 38
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On the Petition:
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SUPREME COURT OF NEW JERSEY
C-236 September Term 1990
33,326

Filed
Supreme Court
October 22, 1990
Stephen W. Townsend
Clerk

FRED J. TOCCO,
Plaintiff-Petitioner,

v.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING,
Defendant-Third Party
Plaintiff-Respondent,

and

TOWNSHIP OF CHERRY HILL,
Third-Party Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-6301-88T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

Pal

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton this 16th day of October, 1990.

/s/ Stephen W. Townsend
CLERK OF THE SUPERIOR COURT

576 A.2d 327

FRED J. TOCCO, PLAINTIFF-APPELLANT,
V. NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING, DEFENDANT-
THIRD-PARTY PLAINTIFF/RESPONDENT,
V. TOWNSHIP OF CHERRY HILL,
THIRD-PARTY DEFENDANT/RESPONDENT.

Superior Court of New Jersey
Appellate Division

Argued May 1, 1990–Decided July 3, 1990

SYNOPSIS

Property owner brought suit, in which he alleged that 18-month land development moratorium constituted unconstitutional "taking" within meaning of Fifth Amendment. The Superior Court, Law Division, Atlantic City, granted defendant's motion for summary judgment, and plaintiff appealed. The Superior Court, Appellate Division, Arnold M. Stein, J.A.D., held that 18-month land development moratorium imposed on municipality in which land was scarce, to enable mu-

nicipality to provide for its fair share of low and moderate income housing, was not unconstitutional.

Affirmed.

Before Judges ANTELL, ASHBEY and ARNOLD M. STEIN.

S. David Brandt argued the cause for appellate (Brandt, Haughey, Penberthy, Lewis & Hyland, P.C., attorneys; Patrick F. McAndrew and S. David Brandt on the brief; Patrick F. McAndrew on the reply letter brief.)

Gerald Callahan, Deputy Attorney General, argued the cause for respondent Council on Affordable Housing (Robert J. DelTufo, Attorney General; Mary C. Jacobson, Deputy Attorney General, of counsel; Geraldine Callahan on the brief).

Francine I. Axelrad argued the cause for respondent Township of Cherry Hill.

The opinion of the court was delivered by

ARNOLD M. STEIN, J.A.D.

Plaintiff appeals the order granting summary judgment to defendant-third-party plaintiff Council on Affordable Housing (COAH) and dismissing the complaint. In a comprehensive oral opinion, Judge Gibson ruled that COAH's imposition of an eighteen-month moratorium on the development of certain lands in Cherry Hill Township was not an unconstitutional taking of plaintiff's affected property. U.S. Const., Amend. V and XIV; N.J. Const. (1947), Art. I, ¶20. We agree and affirm.

Plaintiff is the owner of 140 acres in Cherry Hill. In May 1985, a complaint was filed in the Law Division (Fair Share Housing Center, Inc., et al. v. Township of Cherry Hill, Docket No. L-042750-85P.W.), alleging that the township had failed to provide for a fair share of its region's present and prospective needs for low and moderate income housing. N.J. Const. (1947), Art. I, ¶1; Art. IV, §6, ¶2. So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 174, 336 A.2d 713 (1975) (Mount Laurel I); So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 208-209, 456 A.2d 390 (1983) (Mount Laurel II).

In 1985, in response to the Mount Laurel rulings, the Legislature enacted the Fair Housing Act, N.J.S.A. 52:27d-301

et seq., L.1985, c. 222, §1, eff. July 2, 1985. The act is intended to satisfy the constitutional obligations enunciated by our Supreme Court in the two Mount Laurel decisions. N.J.S.A. 52:27D-302 creates COAH and endows that agency with the powers to define housing regions within the state and the regional need for low and moderate income housing, along with the power to promulgate guidelines for municipalities to determine their fair share of their regions' needs. The council is also empowered to decide whether the proposed ordinances and related planning steps will satisfy a particular community's Mount Laurel obligations.

The Act further provides for all pending and future Mount Laurel cases to be transferred to COAH, except where, in

cases filed more than sixty days before July 2, 1985, such transfer would result in "manifest injustice to any party to the litigation." N.J.S.A. 52:27D-316.

By letter dated January 23, 1986, Judge Gibson transferred the discriminatory housing suit against Cherry Hill to COAH.

By resolution dated March 2, 1987, COAH found that the regional housing element and fair share plan (N.J.S.A. 52:27D-309) submitted by Cherry Hill contained certain deficiencies which the municipality was given sixty days to correct. Thereafter, by resolution dated April 29, 1987, COAH determined that land was a scarce resource in Cherry Hill, and issued an order restraining the municipality from granting any type of develop-

ment approval for any parcel of land of two or more acres. The restraint was issued pursuant to N.J.A.C. 5:91-11.1:

> At any time, upon its own determination, or upon the application of any interested party, and after a hearing and opportunity to be heard, the Council may issue such orders as may be necessary to require that a participating municipality take appropriate measures to preserve scarce resources that may be essential to the satisfaction of the municipality's obligation to provide for its fair share of its region's present and prospective need for low and moderate income housing.

This regulation derives its substantive authority from Hills Dev. Co. v. Bernards Tp. in Somerset County, 103 N.J. 1, 510 A.2d 621 (1986) (Hills Development):

> We have concluded that the Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate

> measures to preserve "scarce resources," namely, those resources that will probably be essential to the satisfaction of its Mount Laurel obligation. [Id. at 61, 510 A.2d 621].

COAH denied plaintiff's petition for exemption from the development moratorium.

The negotiation process between Cherry Hill and COAH was unproductive. Because the municipality failed to make the necessary correction to the housing element and fair share plan required by COAH pursuant to N.J.S.A. 52:27D-351b, the agency denied the township's petition for substantive certification of the plan. The denial resulted in remand of the matter to the Law Division and expiration of the vacant land development freeze one month from the September 26,

1988 date of COAH's resolution of denial. By the time that the freeze expired, it had been in effect for about eighteen months.

[1] Plaintiff does not attack N.J.A.C. 5:91-11.1, the regulation pursuant to which the freeze was ordered, nor does he dispute the reasonableness of the freeze or its duration. Instead, he assumes the propriety of the development restriction, but claims that its implementation was a temporary taking of his property without due process of law.

Plaintiff's contention that Cherry Hill is answerable in just compensation damages is clearly without merit as a matter of fundamental procedure. He has not sued Cherry Hill. The township is a party to this action only by virtue of

its joinder by COAH as a third-party defendant. COAH is the only direct defendant and the only party against whom plaintiff has sought relief.

We reject plaintiff's contention that he is entitled to just compensation as a result of the eighteen-month freeze imposed by COAH. He relies upon Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968), in which the landowner sought subdivision of a sixteen-acre parcel to build one-family homes. While the application was pending, Englewood adopted an ordinance placing plaintiff's land on the city's official map and designated it as property re-

served for park use. N.J.S.A. 40:55-1.32 now repealed.[1]

> Upon the application for approval of a plat, the municipality may reserve for future public use the location and extent of public parks and playgrounds shown on the official map, or any part thereof and within the area of said plat for a period of one year after the approval of the final plat or within such further time as agreed to by the applying party. Unless within such one year period or extension thereof the municipality shall have entered into a contract to purchase, or instituted condemnation proceedings, for

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[1] The successor statute, N.J.S.A. 40:55D-44, continues the one-year freeze provision against development of certain public property, but expressly provides just compensation to the developer for actual loss incurred during the period of temporary reservation and deprivation of use. Just compensation is deemed to be the fair market value of an option to purchase the land for the period of reservation. Other incidental damages, such as taxes and reimbursement for unnecessary expenditure of professional fees in development of the property, are also allowable.

> said park or playground according to law, such applying party shall not be bound to observe the reservation of such public parks or playgrounds.

[2] The potential effect of the statute and its implementation by Englewood's ordinance was to prohibit development of plaintiff's property for one year. The Supreme Court concluded that

> the 'option' for the purchase of land upon the unilateral action of the municipality without any consensual action of the landowner, was statutorily granted to the municipality only upon the implied duty and obligation to make payment of adequate compensation to the landowner for the temporary taking and his deprivation of use. [Lomarch, supra, 51 N.J. at 113, 237 A.2d 881].

Lomarch is distinguishable. That case involved a development moratorium affecting a particular parcel of land. This plaintiff's land is one of several

tracts subject to the eighteen-month development freeze imposed by COAH. The imposition for a reasonable time period of a moratorium on land development for environmental and other public interest reasons does not constitute a temporary taking of an affected landowner's property. Absent extraordinary delay, decreases in the value of property during governmental deliberations are incidents of ownership, and do not result in a taking. Littman v. Gimello, 115 N.J. 154, 163, 557 A.2d 314 (1989) (absent showing of unusual delay in government action, declaration of plaintiff's property as potential hazardous waste facility site not a taking); Wilson v. Long Branch, 27 N.J. 360, 374, 142 A.2d 837 (1958), cert. den. 358 U.S. 873, 79 S.Ct. 113, 3 L.Ed.2d 104

(1958) (no taking because property declared to a be in blighted area); Orleans Builders & Developers v. Byrne, 186 N.J. Super. 432, 446, 453 A.2d 200 (App. Div. 1982), certif. den. 91 N.J. 528, 453 A.2d 851 (1982) (no taking where executive order banned development pending enactment of Pine Lands Protection Act, N.J.S.A. 13:18A-1 et seq., which regulated development in Pine Lands); Meadowland Reg., etc. v. Hackensack, etc., 119 N.J. Super. 572, 578, 293 A.2d 192 (App. Div. 1972), certif. den. 62 N.J. 72, 299 A.2d 69 (1972) (two-year freeze on use of 10,000 acres in Meadowlands pending completion of regional development plan not a taking). Cf. Washington Market Enterprises v. Trenton, 68 N.J. 107, 122, 343 A.2d 408 (1975) (unconstitutional tempo-

rary taking can result where threat of condemnation substantially destroys beneficial use of property for extended periods; plaintiff's commercial building located in area designated as blighted for over ten years until abandonment of blighted designation, during which retail value of plaintiff's property plummeted).

[3] A land development moratorium imposed for the purpose of enabling a municipality to fulfill its constitutional obligation to provide for its fair share of low and moderate income housing is not unconstitutional. Hills Development, supra, 103 N.J. at 61, 510 A.2d 621.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY
DOCKET NO. L-04280-88PW

FRED J. TOCCO,

PLAINTIFF

VS.

TRANSCRIPT OF
RULING
(TELECONFERENCE)

NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING and
TOWNSHIP OF CHERRY HILL,

DEFENDANT.

AT: ATLANTIC COUNTY COURTHOUSE
ATLANTIC CITY, NEW JERSEY
ON: FRIDAY, JULY 7, 1989

BEFORE:
THE HONORABLE L. ANTHONY GIBSON, JSC

ORDERED BY:
S. DAVID BRANDT, ESQUIRE

APPEARANCES:

BRANDT, HAUGHEY, PENBERTHY, LEWIS
AND HYLAND
BY: S. DAVID BRANDT, ESQUIRE
ATTORNEY FOR PLAINTIFF

GERALD CALLAHAN, ESQUIRE
DEPUTY ATTORNEY GENERAL
ATTORNEY FOR COUNCIL ON AFFORDABLE
HOUSING

FRANCINE AXELROD, ESQUIRE
ATTORNEY FOR TOWNSHIP OF CHERRY HILL

KATHY E. DURAND, CSR, CM
OFFICIAL COURT REPORTER
ATLANTIC COUNTY
1201 BACHARACH BLVD, RM 241E
ATLANTIC CITY, NJ 08401

THE COURT: On the line is Geraldine Callahan and David Brandt, This is Tocco vs. Council On Affordable Housing. I'd like to ask that you each state your appearances for the record in Tocco v. COAH, and I'll begin with you, Mr. Brandt.

MR. BRANDT: This is David Brandt, I represent Fred Tocco, the plaintiff.

MS. CALLAHAN: And this is Geraldine Callahan on behalf of the Council on Affordable Housing.

MS. AXELROD: Your Honor, Fran Axelrod on behalf of the third party defendant, Township of Cherry Hill.

THE COURT: The matter which is before me today, and the reason that I've asked counsel to be present, is the remainder of an outstanding motion which was made by Mr. Brandt in behalf of the

plaintiff Tocco. That motion included an application for partial summary judgment, and the matter was first argued before me, I believe, back in January. At that time, although the Court reacted to certain of the issues that were involved in not only the motion by Mr. Brandt, but the cross motion which had been filed, I left open one of the issues in order to obtain further input from counsel. That issue dealt with, particularly, the question of whether the action by COAH which I will describe in some additional detail, represented a taking, thereby entitling the plaintiff to compensation. Further input was submitted to the Court thereafter by counsel, which the Court has had an opportunity to review, and I'm now in a position to complete my ruling.

The precise action that is challenged in this portion of the plaintiff's motion is the determination by the Council On Affordable Housing which established the Township of Cherry Hill as a township with scarce resourses, and as a result of that determination, the restraint, or moratorium, if you will, that precluded the development of all undeveloped land in the Township in excess of two acres while the issue of an appropriate housing plan for the Township was being developed.

The factual background which led to that particular determination is somewhat lengthy and I don't believe it is necessary that I deal with all of it for purposes of this ruling. There are certain events, however, that I think should be highlighted.

First of all, as counsel knows, and is clear, generally, the Legislature of this State passed the Fair Housing Act, which is NJSA 52:27A-301, et seq, in response to our Supreme Court's ruling in the case of Southern Burlington County NAACP v. Mount Laurel Township. Actually, I should say rulings in the plural because there was more than one. Those rulings found that there was a constitutional obligation for communities such as Cherry Hill to provide a fair share of low and moderate income housing. Pursuant to the Fair Housing Act, Cherry Hill was required to submit its housing element and Fair Share Plan to an administrative agency created under that Act, known as the Council on Affordable Housing, which I will refer to in my opinion either as the Council or as COAH.

The initial step in the development of that process included the establishment of certain guidelines and criteria by the Council, and after that was done, a determination was made in connection with a number of municipalities, including cherry Hill, which impacted on the obligation of those communities. Cherry Hill, in an attempt to address the need that had been identified for its geographic boundaries, prepared a resolution and submitted it to the Council for consideration. that was back in 1987. In March of that same year, COAH required Cherry Hill to come before the Council and to show cause why vacant land which existed in Cherry Hill should not be declared a scarce resource and why the Council should not impose restraints on the development of that land. All inter-

ested parties were noticed with respect to the application and a hearing was held, I think on March 16th, 1987.

On April 20, 1987 COAH determined that vacant land in Cherry Hill was a scarce resource and an order was entered that Cherry Hill officials not grant any type of development approvals for any type of land in excess of two acres. The order further provided that projects which received preliminary or final approval, and properties where the owner had sought to add to an existing structure would be exempted from the order. The order further provided that any effected party could seek an exemption from the terms of the order, and the order was to be effective until the Council had formally acted on Cherry Hill's antici-

pated petition for substantive certification.

The plaintiff, Fred Tocco, is the equitable owner, or was the equitable owner at that time of property located in Cherry Hill commonly referred to as the Short Hills Farm site. It consisted of one hundred forty acres, and I think the plaintiff was also the owner at that time of an additional eleven acres in a contiguous site.

In April of 1987, Tocco filed an application for preliminary subdivision approval before the Cherry Hill Township Planning Board and was not able to obtain approval as a result of the prior order. The process continued between Cherry Hill Township and COAH with respect to the certification, and that particular procedural history is, in itself, quite

lengthy and involved. I think, for present purposes, it is sufficient to say that there was a more or less ongoing effort on the part of Cherry Hill and the Council to deal with the housing plan, the approval of a housing plan, although ultimately the Council rejected Cherry Hill's position and remanded the issue of Cherry Hill's obligation to this Court.

In the meantime, the restriction which the scarce resource determination had included continued, and the plaintiff continued to be restricted in the development of the property which had been under agreement of sale and for which he had been the equitable owner. Pursuant to the terms of the restriction by COAH, Tocco was eligible to seek an exemption of his property or a portion of it, from the restraints, as was any other property

owner similarly situated. Tocco made such an application in January of 1988, and by order dated May 2nd, 1988 COAH denied that request. In May of 1988, plaintiff then filed this complaint in lieu of prerogative writ claiming that the actions of the Council in denying plaintiff's use of his property for over, what then constituted, I think, about a year, represented a taking for which the plaintiff was entitled to compensation.

During that same time period, the Council was continuing to review Cherry Hill's plan, and although, as I said, that ultimately resulted in a denial of Cherry Hill's application and a remand to this Court, it's important, I think, to remember that the process was ongoing and being pursued with some diligence.

(Off-the-record discussion).

The only other point that is necessary to refer to, from the factual perspective, is the fact that the total time period which plaintiff claims to have been effectively denied the use of his property was a total of eighteen months. The record should probably also refer to the fact that once the case was back before me an application was made by the plaintiff in separate litigation seeking to continue restraints that had been imposed by COAH, which restraints expired by their own terms during the time period that I was just referring to. This Court did elect to impose a limited injunction against the development of undeveloped lands in Cherry Hill based on the conclusion that there was a scarce resource facing the Court nd the Township. The action of this Court, at least at this

point, has not been challenged by this plaintiff.

And finally, I think I should mention the fact that there was no appeal taken from COAH's actions, and the breadth of the determination by COAH has not been challenged. Instead, it is the length of it and the impact of it which is the focus of this challenge.

Passing now to the legal discussion, the question basically is whether the actions just described by COAH constitute a taking, that is, an unlawful deprivation of the reasonable use of plaintiff's land under all the circumstances described. Plaintiff claims that COAH's restraining order denied it any and all profitable or productive use of his property from April of 1987 through September '88, and that under the circumstances,

that action constituted a compensible taking under the New Jersey Constitution, as well as the Federal Constitution.

There is no real question in this case as to what the applicable standard is with respect to the constitutional obligation, and that obligation is incorporated into the 5th Amendment of our Federal Constitution which provides, in part, that private property shall not be taken for public use without just compensation. Identical language is contained in our new Jersey Constitution in Article One, Section Twenty. Those provisions do not prohibit the taking of private property, but instead, place a condition of compensation on the exercise of that right. Our United States Supreme Court has stated that the Just Compensation Clause, as it is also referred to, was

designed to prevent the government from forcing some individuals to bear public burdens which, in all justice and fairness, should be borne by the public as a whole as opposed to a single individual.

On the other hand, the Supreme Court, and I'm referring now to our Federal Supreme Court, although I think the same has been argued and suggested with respect to certain of the cases of our own Supreme Court, and that is, that guidelines for what constitutes an unlawful taking have not been particularly precise, and as a result, each case has to be examined based on its own peculiar facts.

Some of the circumstances which must be inquired into include the character of the action taken by the governmental entity and the economic impact of that

action on the particular landowner involved, particularly with respect to how that action interferes with the owner's reasonable use expectation. Those guidelines, however, don't create any bright lines for this Court or other Courts, but there is a good deal of guidance from which one can glean,I think, how the actions of COAH here should be viewed, given this challenge.

For example, we know that Mr. Tocco has not been singled out, for example, with respect to the restraint on the use of his property. He is a property owner who is in the same boat, so to speak, as every other property owner who owns two or more acres of land in Cherry Hill, nor is this a situation where the fundamental determination with respect to a scarce resource is being challenged or alleged.

The Supreme Court of this State has specifically authorized the Council, in exercising its jurisdiction, to make determinations, where appropriate, to preserve the resources of a particular community if that is needed in order to satisfy that community's Mount Laurel obligation. So such an authority is not only clear, but municipalities and COAH are directed to consider that particular concept in seeking to satisfy the constitutional obligation which was identified by the Court.

Authority for this proposition is made very clear in the case of Hills Development Company vs. Bernards Township, 103 New Jersey, page one. This particular concept has been codified by COAH through its regulations, and NJAC 5:91-11.1 specifically provides the authority

for restraining orders by COAH in situations in which there is a determination of a scarce resource. So we do know that, in this case, we do not have some of the so-called classic problems that have been identified in those cases where a Court has determined there to be a taking.

There are a number of cases which, in my opinion, support the opposite conclusion. There are a number of cases, for example, in this State and elsewhere which uphold the validity of a so-called moratorium on development where the action by the governmental entity has a reasonable basis in providing and protecting the public welfare. The factual underpinnings for the reasonableness of this action clearly exist, both with respect to the direction of the Supreme

Court in the Hills case, the promulgation of the regulations by COAH generally, and the particular determination, that is, the particular factual determination made by COAH with respect to Cherry Hill in particular. I think it's fair to conclude, therefore, that there is ample support for the conclusion by this Court that the action, insofar as the determination of a scarce resource and the imposition of a restraint in response to that determination, was a reasonable action taken by COAH.

It's also important, I believe to recognize that the action by COAH was tailored. It was widespread in its implication, but it was selective in trying to deal with what would realistically be available for an accommodation of what would ultimately be Cherry Hill's obliga-

tion to provide low and moderate income housing. It was limited to sites in excess of two acres and it also was limited in time. In addition, it included an escape valve by permitting application to be made for exemptions, which the plaintiff sought to take advantage of, and which, as I said, was denied, and that denial was not appealed -- or was it? Am I wrong about that? You didn't appeal that denial, did you, Dave?

MR. BRANDT: No, sir, it was not appealed.

THE COURT: Okay. I think the focus then becomes two fold, whether the time during which this restraint continued was an unreasonable one, and secondly, whether the recent decisions by our U.S. Supreme Court in the zoning area somehow changed the judicial landscape, so to

speak, in this area. And let me deal first with the question of time.

There is no set time that this Court can identify nor which has been suggested to this Court by any of the counsel involved here that would allow me to plug this particular action in order to get a clear result. Once again, it's a matter of examining all the facts and circumstances to determine what is reasonable. There are cases which have been cited which have involved restraints longer than this, some shorter than this. Ultimately, it's for this Court to determine whether, under all the facts and circumstances, an eighteen month restraint in this setting was too much. It's my judgment, that given the burden that the plaintiff has here, and given the factual record before this Court, I'm not pre-

pared to conclude that eighteen months was too much. There was, as I said, an ongoing application and certification process before COAH during this time period in which Cherry Hill actively participated ,and there was available relief from that order which was pursued, but not successful, for reasons that this Court, on this record, must assume to have been valid. That action, I thin, would have been reviewable, and is reviewable in the Appellate Division, but no appeal was taken from it.

In recognizing the process of developing a plan, I think it is also fair to say that the Court can take judicial notice that such a process is not simple and that it involves a good deal of planning and an accommodation of a variety of circumstances which can be quite complex.

This Court has had experience in that process through handling other cases of this type, and to see the process consuming eighteen months or more is not surprising or unexpected,or, in my opinion, again, based on the record before me, unreasonable. So that particular element of the focus is one that I think must be resolved against the plaintiff.

The other element that I mentioned which requires some further review is the notion that the law may have changed in this care as a result of some recent pronouncement by our United States Supreme Court, one being the case of First English Evangelical Lutheran Church v. The County of Los Angeles that is cited at 197 Supreme Court 2378, a 1987 case. The case is lengthy and somewhat complex and I do not intend a thorough analysis of

it, because i don't think it is necessary. I don't think that that case really speaks to the question of what is before this Court. It talks about temporary taking and it makes clear the obligation of a governmental entity to compensate a landowner when there has been a temporary taking. But in that case, the Court assumed the existence of the taking, and what was not before that Court which is before me, is the question of whether there is a taking at all. So although I think it is fair to say, as many scholars have suggested, that the Supreme Court of our country may have signaled a change in direction in this area, that is,the area of the requirement of governmental entities to compensate property owners for the regulations that may be imposed on that property, it is

difficult for me to conclude from that case that the result here should be any different. The signals, to the extent that they exist, don't tell me enough to justify my concluding that the existing case law in New Jersey, for example, can now no longer be relied on with respect to the upholding of the reasonableness of moratoriums. I think it would be necessary for me to reach such a conclusion in order to support the plaintiff's motion, and I don't think that the First English case justifies that conclusion.

That is not to say that future developments in this area may not clarify this question in a way which the plaintiff would support, and I think it is fair to say that further developments are to be expected which could impact on this question, but I don't conclude from that

any mandate or even authority for me to go beyond the conclusion which I have made. And that conclusion is that the action by COAH was not an unreasonable one, either in terms of its scope or its duration, and that I'm not prepared to conclude that the action constituted a taking for which the plaintiff is entitled to compensation.

I will quickly add that this particular question intrigued me a great deal when it was first raised, and continues to intrigue me, because this is an area where I believe there are some interesting, and what I think are competing policy considerations that are difficult to reconcile, and that was one of the reasons that I sought to look at this whole question further after the matter was first considered by me. But having done

so, I don't believe that it is appropriate for this Court conclude other than what I have described.

Interestingly enough, there is a recent case by our own Supreme Court dealing with the question of inverse condemnation. I think it's Littman vs. Gimello, which was decided this year and which is sited at 115 New Jersey 154, and in that case, the Court held that the identification of the plaintiff's property by the Hazardous Waste Siting Commission as a potential site for the construction of hazardous waste facilities did not constitute a compensible taking, even though that determination had had a significant adverse impact ont he ability of the property owner to effectively use his property. The Court concluded that

even though that had occurred, there was not a total deprivation of use.

Our own Supreme Court doesn't seem inclined to follow any lead that may be read into the recent U.S. Supreme Court decisions that have been predicated as restricting the activity of governmental entities in this area, and I think the Littman case is support for that particular observation. And of course, I am bound by the determinations of our Supreme Court in this and other areas. Although I continue to find this whole question of a taking a troublesome one, it is my judgment that, under the facts and circumstances developed before me in this case, the plaintiff's motion should be denied, and that will be the ruling of this Court.

I'm going to ask that Deputy Attorney General submit an order to me consistent with my ruling,and I'm going to now ask each individual counsel to indicate to me whether they have any questions regarding my ruling. Mr. Brandt?

MR. BRANDT: No, I have no question.

THE COURT: Ms. Callahan?

MS. CALLAHAN: The only question I have is, does that mean that Council's crossmotion has been granted, that there is summary judgment, and that would be the end of the case?

(Off-the-record discussion).

THE COURT: Okay, any other questions?

MS. AXELROD: No questions, Your Honor.

MR. BRANDT: Judge, I was just going to make things simpler, since I'm very

confident that you will conclude that you grant Geraldine's motion, there is no need to call me and waste a lot of time, you can just call her and tell her to submit the appropriate order.

THE COURT: All right, fine. Yes, I agree with you, that's what seems very logical and predictable to me, but I just want to make sure that I haven't overlooked something that I should mention in that regard, which I doubt. Okay.

NOTE: ALL ERRORS IN TEXT ARE IN ORIGINAL TRANSCRIPT.

FRED J. TOCCO,
Plaintiff,

v.

COUNCIL ON AFFORDABLE HOUSING,
a statutory body of the State
of New Jersey,
Defendant.

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
LAW DIVISION
DOCKET NO. L04280-88 P.W.

VERIFIED COMPLAINT IN LIEU OF
PREROGATIVE WRITS

Plaintiff, Fred J. Tocco, being the owner of certain land situate in Cherry Hill Township, Camden County says by way of Complaint:

1. He is the equitable owner of Lots 2, 3 and 3A Block 521 of the Tax Map of Cherry Hill (commonly referred to as the Short Hills Farm Property and known hereafter as the "Property") under an Agreement of Sale for the acquisition of approximately 140 acres, more or less

from John Gilmour. The Plaintiff is also the legal owner of approximately 11 acres located within the interior of the above tract and which is not the subject of the within action.

2. The land is zoned R-1 for single family dwellings and it is the intention of the Plaintiff to develop lots 3 and 3A primarily for that purpose. Lot 2 consists of approximately 8 acres and is intended for commercial development.

3. The Defendant Council on Affordable Housing issued a restraint on April 20, 1987 which prohibits development of any land in Cherry Hill Township of more than 2 acres. This restraint affects plaintiff's property and was allegedly issued to preserve scarce municipal resources necessary to satisfy

the community's obligation under the Fair Housing Act. (N.J.S.A. 52:27D-301.)

4. Plaintiff filed for preliminary subdivision approval before the Cherry Hill Township Planning Board on April 21, 1987 and a public hearing was held on June 15, 1987. Although the Planning Board was prepared to proceed and all other aspects of the application were satisfactory to the Board, no action was taken because of Defendant's restraint. Since that time the restraint has remained in effect. However, Plaintiff moved before the Defendant to exempt its property or a portion thereof on January 29, 1988. The Defendant denied that request on May 2, 1988.

5. The action of the Defendant in this regard has been overly broad and constitutes arbitrary, capricious and

unreasonable action since there is adequate available land to satisfy the requirements of the Fair Housing Act without inclusion of the Plaintiff's property.

6. The Plaintiff has expended in excess of $500,000 per year for land costs, taxes, engineering and legal fees and other expenses during the period of time the restraint has been in effect. These payments have constituted a substantial financial hardship on the Plaintiff and have resulted in irreparable injury to him.

. The denial of Plaintiff's request for exemption and the continuing restraint by the Defendant has substantially destroyed the beneficial use of Plaintiff's property and constitutes a "taking" under the provisions of the

United States and New Jersey Constitutions and thereby requires the payment of just compensation to the Plaintiff.

WHEREFORE, Plaintiff demands judgment against Defendant:

(a) Determining that the restraint imposed by Defendant as it affects Plaintiff's land is a taking of property requiring the payment of just compensation.

(b) For an Order directing the Defendant either to pay to the Plaintiff just compensation or institute condemnation proceedings to fix said just compensation.

(c) For such other relief as the Court may deem appropriate and equitable.

(d) Costs of this action.

BRANDT, HAUGHEY, PENBERTHY, LEWIS & HYLAND, P.A.

By: /s/ Richard S. Hyland
RICHARD S. HYLAND

By:/s/ S. David Brandt
S. DAVID BRANDT

Co-counsel for Plaintiff

DATED: , 1988.

VERIFICATION

I, FRED J. TOCCO, have red the allegations contained in the foregoing Complaint and swear that the allegations contained therein are true based upon my personal knowledge.

/s/ Fred J. Tocco
FRED J. TOCCO

CERTIFICATION PURSUANT TO RULE 4:5-1

I hereby certify that the matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding. Furthermore, I am unaware of the names of any other parties who should be joined in this action.

/s/ S. David Brandt
S. DAVID BRANDT

Dated: , 1988.

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO.

FAIR SHARE HOUSING CENTER, INC., NEW JERSEY COUNCIL OF CHURCHES, CAMDEN COUNTY BRANCH OF THE N.A.A.C.P. and SOUTHERN BURLINGTON COUNTY BRANCH OF THE N.A.A.C.P.,

Plaintiffs, Civil Action

v. ORDER

TOWNSHIP OF CHERRY HILL, NEW JERSEY,

Defendant.

This matter having been raised by the Council on Affordable Housing sua sponte and heard on March 16, 1987 in the presence of counsel for plaintiffs Fair Share Housing Center, Inc., et al; defendant Township of Cherry Hill; interested party Builders League of South Jersey; Tedco Equities; the Bleznak Organization; Unity Capital Corporation; Norther Lites, Ltd.; KIMCO of Cherry Hill, Inc.; Lone Tree Partnership; Rouse & Associates;

Woodland Falls Associates and Alan Ebert of Springdale Farms appear pro se on the issues of whether vacant land is a scarce resource in the Township of Cherry Hill and further whether, if vacant land is a scarce resource, the Council on Affordable Housing should impose conditions upon the development of vacant land in the Township of Cherry Hill; and

The Council having considered all papers submitted and having heard oral argument; and all parties who might be affected by the imposition of conditions having been notified of the hearing; and for the reasons expressed in the Council's written opinion of even date,

IT IS on this 14th day of April, 1987

ORDERED that the Township of Cherry Hill, the Township of Cherry Hill Plan-

ning Board, Board of Adjustment and Zoning Board and any other person, agent or employee who has the authority to grant any type of development approvals are hereby restrained from granting any type of development approval for the development of any parcel of land of two acres or more in size; and it is further

ORDERED that the following properties shall not be included within the terms of this Order:

1. Those projects which have received preliminary or final site plan approval;
2. Those properties where the owner seeks to add to an already existing structure;

and it is further

ORDERED that the Order entered by the Honorable L. Anthony Gibson, J.S.C.

on January 23, 1986 shall remain in full force and effect; and it is further .

ORDERED that this Order shall remain in full force and effect, unless otherwise modified by the Council, until the Council acts upon Cherry Hill's Petition for substantive certification.

COUNCIL ON AFFORDABLE HOUSING

By/s/ Arthur R. Kondrup
Arthur R. Kondrup
Chairman

wp4327.pfm/0191-11

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-1219

In The

Supreme Court of the United States

October Term, 1990

FRED J. TOCCO,

Petitioner,

v.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING and TOWNSHIP OF CHERRY HILL,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT COUNCIL ON AFFORDABLE HOUSING

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QUESTION PRESENTED

Does the Takings Clause of the Fifth Amendment require the State of New Jersey to pay compensation to owners of land subject to a local development moratorium, which was of limited duration, provided for exemptions and was established for the public purpose of preserving scarce land resources during the time that the extent of the municipality's obligation under the State Constitution to provide lower income housing is subject to administrative review?

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Cases Cited

Agins v. Tiburon, 447 *U.S.* 255 (1980) ..... *passim*

Andrus v. Allard, 444 *U.S.* 51 (1979) 13

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Holmdel Builders Ass'n v. Twp. of Holmdel, 121 *N.J.* 550, 583 *A.*2d 277 (1990)..... 5, 9, 15

Kaiser Aetna v. United States, 444 *U.S.* 164 (1979) 12

Kirby Forest Industries, Inc. v. United States, 467 *U.S.* 1 (1984) 6, 7, 11, 13

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STATEMENT OF THE CASE

In two landmark decisions, the Supreme Court of New Jersey declared that each municipality in the State has a unique and important obligation under New Jersey's constitution to provide a realistic opportunity for its fair share of lower income housing. *N.J. Const.* (1947), art. I, ¶1; art. IV, § 6, ¶2. *So. Burl. City. N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 *N.J.* 151, 174, 336 *A.*2d 713, *cert.* denied 423 *U.S.* 808 (1975) (*Mt. Laurel I*); *So. Burl. Cty. N.A.A.C.P. v. Mt. Laurel Tp.*, 92 *N.J.* 158, 208-09, 456 *A.*2d 390 (1983) (*Mt. Laurel II*). In response to the so-called *Mt. Laurel* decisions, the State Legislature enacted the Fair Housing Act (the Act), *N.J.S.A.* 52:27D-301 *et seq.*, to provide a comprehensive mechanism to address in an orderly and meaningful way the constitutional duty of all local communities. See *N.J.S.A.* 52:27D-303.

Among its many regulatory features, the Act created a State agency known as the Council on Affordable Housing (the Council) and gave it wide-ranging administrative powers to define regional needs throughout New Jersey for low and moderate income housing, to establish guidelines for municipalities to determine their fair share of the region's needs and to decide if proposed ordinances and related planning steps will satisfy local needs. *Hills Dev. Co. v. Bernards Tp.*, 103 *N.J.* 1, 21-23, 510 *A.*2d 621, 632-33 (1986) (*Hills Development*). Under the Act, a municipality is required to submit to the Council a "housing element," which is an analysis of the measures it plans to take to address its lower income housing obligation, and a "fair share plan," the township's proposed ordinances designed to actually carry out its planning steps. *N.J.S.A.*

52:27D-309(a); *N.J.A.C.* 5:91-4.2. Based on these submissions, a community may petition the Council for "substantive certification" which, if granted constitutes approval of the plan to satisfy the municipality's *Mt. Laurel* obligation. *N.J.S.A.* 52:27D-313. In order to ensure that a community will still be in a position to meet its fair share obligation at the conclusion of the substantive certification process, the Council is authorized to require a municipality to preserve its scarce resources, such as vacant land, that may be essential to satisfy its fair share housing obligation. *Hills Development, supra,* 103 *N.J.* at 61, 510 *A.*2d at 653.*

In May 1985 an exclusionary zoning lawsuit was filed against Cherry Hill in the State's trial court alleging that the township had failed to provide for its fair share of lower income housing. *Fair Share Housing Center, Inc., et al. v. Township of Cherry Hill,* Docket No. L-042750-85 P.W. (Law Division, Superior Court). Pursuant to the Act and the *Hills Development* opinion, the case was transferred by the court to the Council, and Cherry Hill eventually applied for substantive certification in January 1987.

The Council determined in March 1987 that Cherry Hill's housing element and fair share plain had certain deficiencies, and the township was given 60 days to submit a corrected plan. The Council also determined that land was a scarce resource in Cherry Hill and, in an order dated April 24, 1987, the township was restrained by the Council from granting development approval for

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* The authority to preserve scarce resources was later codified by the Council in its regulations. *N.J.A.C.* 5:91-11.1.

any vacant land of two or more acres until the Council acted on Cherry Hill's request for substantive certification. Relief from the restraining order was available in the form of exemptions. (Pa34-Pa37).* The purpose of the restraint was to ensure that scarce vacant land did not disappear while the administrative process was pending.

Fred. J. Tocco owns about 140 acres of vacant land in Cherry Hill, New Jersey. More than nine months after the Council's restraints on development were ordered, Tocco asked the Council on January 29, 1988 to grant him an exemption from the terms of the order. The Council denied the request because Tocco's land was suitable for lower income housing development and relief from the restraints at that time would therefore be inappropriate given the limited amount of vacant land available in Cherry Hill. Tocco did not appeal from this denial, nor did he later seek a more narrow or limited exemption from the order.

Ultimately, the administrative process proved unsuccessful. Although the Council conditionally granted Cherry Hill's petition for substantive certification in July 1988, the township failed to satisfy the conditions and the Council was forced to deny the petition in September 1988. The question of the township's failure to provide a realistic opportunity for its fair share of lower income housing was therefore remanded to the State trial court in accordance with *N.J.S.A.* 52:27D-314. However, the Council's restraints on land development were extended

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* "Pa" refers to the appendix accompanying Tocco's petition. Cites below to "Pb" refer to the petition.

for 30 days to October 26, 1988 in order to preserve the status quo until the trial court could consider the case.*

In the meantime, on May 24, 1988, Tocco filed a complaint in the State's trial court alleging that the Council's restraints, which had been in effect at that time for little more than one year, constituted a temporary taking entitling him to compensation under the New Jersey and United States Constitutions (Pa48-Pa53). This claim was rejected by both the trial court and the State's Appellate Division, the intermediate appeals court in New Jersey. (Pa18-Pa47; Pa3-Pa17).

Holding that the Council's restraints did not amount to an unconstitutional taking under the State or federal constitution, the Appellate Division noted that Tocco did not challenge the Council's scarce resource regulation or the reasonableness of the moratorium or its duration. The State court also correctly observed, while weighing the private and public interests at stake, that Tocco was one of many landowners whose property may have been incidentally affected by the legitimate exercise of the State's police powers to preserve scarce resources.* (Pa11;

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* On remand, the trial court restrained all development of land, including Tocco's property, in excess of 10 acres. However, Tocco was granted an exemption in April 1989 and was permitted to proceed through the township's preliminary and final approval process for 48 of his 140 acres on the condition that at least 42 lower income units were built on the site. Tocco was also allowed to apply for preliminary major subdivision approval on the remaining parcel. In March 1990 the trial court released an additional 8 acres to receive final approvals.

* Although noting this observation in his discussion of the State court's opinion (Pb20), Tocco inexplicably asserts as fact

(Continued on following page)

Pa14-Pa15). With respect to his claim that the freeze was nonetheless a temporary taking of his property, the court below applied the well-settled State law principle, interpreted consistently with parallel federal constitutional standards enunciated by this Court, that the imposition of a land development moratorium of limited duration for public interest reason does not constitute a temporary taking of a landowner's property (Pa15). Nor, said the court, does a taking result from a diminution in property values during governmental deliberations, absent extraordinary delay (Pa15-Pa16). Hence, the Court concluded that the Council's "land development moratorium imposed for the purpose of enabling a municipality to

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(Continued from previous page)

at several places in this petition that he has been singled-out or that he was the only landowner affected the moratorium (Pb19; Pb23 to Pb24; Pb25). This misstatement could affect the Court's deliberations on the petition (*Sup.Ct.R.* 15.1) because one of the acknowledged purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 *U.S.* 40, 49 (1960). In weighing the private and public interests at stake, the benefits enjoyed by landowners as a result of the exercise of the police powers must be considered along with any burden occasioned by temporary fluctuations in property values. *Agins v. Tiburon*, 447 *U.S.* 255, 260-62 (1980). Here, in the context of land use regulation designed to promote the general welfare, landowners were not unfairly burdened by a temporary development moratorium since they also undoubtedly benefit as members of the community as a whole by enabling their township to attract housing for the workforce. See *Holmdel Builders Ass'n v. Twp. of Howell*, 121 *N.J.* 550, 562-66, 583 *A.*2d 277, 283-85 (1990); *Mt. Laurel II, supra*, 92 *N.J.* at 209-212 and n.5.

fulfill its [State] constitutional obligation to provide for its fair share of low and moderate income housing is not unconstitutional" (Pa17).

Tocco petitioned New Jersey's highest court for discretionary review of the intermediate appellate court's decision. In an order dated October 16, 1990, the State's Supreme Court denied the application without comment (Pa1-Pa2). Tocco filed a petition for *certiorari* with this Court on January 15, 1991.*

SUMMARY OF REASONS FOR DENYING THE PETITION

1. The petition should be denied because the State court below merely applied the principle long-settled by this Court that reasonable land use regulation in the proper exercise of the police power does not constitute a taking. *Nectow v. Cambridge*, 327 *U.S.* 183 (1928).

2. Land use regulation amounts to an impermissible taking only in extreme circumstances, such as where it fails to promote a legitimate State interest or destroys a fundamental attribute of ownership. *United States v. Riverside Bayview Homes, Inc.*, 474 *U.S.* 121 (1985); *Kirby Forest Industries, Inc. v. United States*, 467 *U.S.* 1 (1984). Thus, even a substantial reduction in the value of property during governmental decisionmaking, absent extraordinary delay, is an incident of ownership and is not considered a

* The petition was returned to Tocco's counsel by the Clerk because of deficiencies. Corrected copies of the petition were received by the New Jersey Attorney General's office on January 30, 1991.

taking in the constitutional sense. *Agins v. Tiburon*, 447 *U.S.* 255 (1980); *Danforth v. United States*, 308 *U.S.* 271 (1939).

3. Consistent with these constitutional standards, the opinion below correctly concluded that any interference with Tocco's property interest caused by the 18-month development moratorium, imposed to promote the general welfare, was not severe enough to be considered a taking in the Fifth Amendment sense. Under State law, lower income housing and the opportunity to provide for it advances the public welfare and is a valid exercise of the State's police powers. *Hills Development, supra*, 103 *N.J.* at 19-26, 510 *A.*2d at 631-34; *Mt. Laurel I, supra*, 67 *N.J.* at 173-91, 336 *A.*2d at 924-34. There was no extraordinary delay in this case occasioned by the Council's review of Cherry Hill's petition for substantive certification and any fluctuation in property value during that time was merely an incident of ownership. In addition, Tocco presented no proof at all concerning the effect, if any, of the moratorium on property values. Moreover, he was not deprived of all use of his land since he did not pursue the kind of limited exemptions from the moratorium that were ultimately sought from and ordered by the trial court, to permit him to use his land in ways that would still preserve enough vacant land for lower income housing. *Penn Central Transp. Co. v. New York City*, 438 *U.S.* 104 (1978). Likewise, the moratorium did not interfere with his right to sell the land. *Kirby Forest Indus., supra*, 467 *U.S.* at 15.

4. It makes no difference that Tocco asserts a "temporary" rather than permanent taking. A temporary taking is not different in kind from a permanent taking. *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 482 *U.S.* 304 (1987) (*First Lutheran Church*). Therefore, the analysis

does not differ depending on the permanency of the taking alleged. An effected landowner must still show, which Tocco did not and could not do, that the land use regulation at issue failed to advance legitimate State interests or destroyed fundamental ownership rights.

REASONS FOR DENYING THE PETITION

There are no special and important reasons why the Court should review this case. *Sup.Ct.R.* 10. The opinion below merely applied the well-established principle that reasonable land use regulation in the proper exercise of the police power does not constitute a taking. See, *e.g.*, *Nectow v. Cambridge*, *supra*, 327 *U.S.* at 188 (1928). Just such a case, and nothing more, is before the Court on this petition.

The Fifth Amendment guarantees that private property will not "be taken for public use, without just compensation."* However, there can be no doubt that government may implement laws or programs that adversely affect property and other economic values. *Penn Central Transp. Co.*, *supra*, 438 *U.S.* at 124-25.

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* Although the State court below did not expressly rely on federal precedent in reaching its decision, the New Jersey Supreme Court has interpreted as coextensive the protections under both the New Jersey and United States Constitutions afforded a landowner against taking property without just compensation. *N.J. Const.* (1947), art. I, ¶20; *U.S. Const.* amends, 5, 14; *Littman v. Gimello*, 115 *N.J.* 154, 557 *A.*2d 314, 317-18, *cert.* denied ___ U.S. ___, 110 *S.Ct.* 324, 107 *L.Ed.*2d 314 (1989).

Government regulations affecting property values work a taking only if their application does not promote legitimate state interests or denies an owner economically viable use of his lands. *Agins, supra,* 447 *U.S.* at 260. Only in "extreme circumstances" will land use regulation amount to an impermissible taking of affected property. *United States v. Riverside Bayview Homes, Inc., supra,* 474 *U.S.* at 126. All the State court did was apply these settled standards of constitutional analysis to the particular circumstances of the taking claim before it.

The State court opinion at issue recognized that the land development freeze imposed by the Council advanced legitimate State interests. Under New Jersey law, providing lower income housing is a governmental end. *Holmdel Builders Ass'n, supra,* 121 *N.J.* at 567, 583 *A.*2d at 285. So too, government regulation designed to provide a realistic opportunity for lower income housing throughout the State promotes the general welfare and is a valid exercise of the State's police powers.* *Mt. Laurel* I, *supra,* 67 *N.J.* at 174-80, 336 *A.*2d at 713-17. The public welfare is similarly served when the Council exercises its regulatory power during the *Mt. Laurel* process to preserve scarce resources, such as vacant land, until it is determined if those resources will be needed to satisfy a municipality's fair share obligation. *Hills Development, supra,* 103 *N.J.* at 61-62, 510 *A.*2d at 653.

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* Housing needs have been recognized by this Court as clearly related to the general welfare. *Berman v. Parker,* 348 *U.S.* 26, 33 (1954).

Indeed, Tocco does not question the Council's authority to preserve scarce resources or the reasonableness of the restraints on land development imposed in this case against Cherry Hill in the proper exercise of the State's police power. (Pall; Pb9 to Pb10). Hence, it was not surprising, and no new constitutional ground was broken, when the opinion below concluded that a development moratorium of limited duration imposed for public interest reasons, during governmental deliberations and to enable compliance with a State constitutional mandate did not result in the temporary taking of an affected landowner's property. Certainly, this mundane application of clearly established takings law does not merit review by this Court.

Likewise, there was nothing remarkable about the State court's recognition that there were no extreme circumstances in this case giving rise to a regulatory taking. Apart from the fact that the land use regulation at issue advanced legitimate State interests during governmental deliberations, there can be no taking unless an owner is deprived of economically viable use of his land. *Agins, supra,* 447 *U.S.* at 260. No such showing was made in this case. Moreover, it is an incontrovertible axiom of takings law that changes in value, even had they been demonstrated here, are incidents of ownership and "cannot be considered as a taking in the constitutional sense." *Danforth v. United States, supra,* 308 *U.S.* at 285.

Along similar lines, fluctuations in the value of property during the process of governmental decisionmaking, in the absence of extraordinary delay, are incidents of ownership and do not work a taking. *Agins, supra,* 447 *U.S.* at 263. Even a substantial reduction in property

value does not result in a taking, absent an interference with the owner's legal right to sell his land. *Kirby Forest Indus., supra,* 467 *U.S.* at 15. Thus, only land use regulations that extinguish a "fundamental attribute of ownership" amount to a taking and entitle a landowner to compensation. *Id.* at 262. In holding that no unconstitutional taking occurred in this case, the court below merely concluded, consistent with these standards, that any interference with Tocco's property interests caused by the 18-month development freeze was not severe enough to be considered a taking in the constitutional sense.

Here, the State court assumed for purposes of its analysis that there may have been some diminution in the value of Tocco's property, but concluded nevertheless that the 18-month moratorium was reasonable given the cumbersome nature of the Council's administrative process. As the trial court had also observed (Pa39 to Pa40), it was not surprising that the moratorium was in effect for 18 months, the corresponding period of time between the dates of Cherry Hill's application for and the denial of substantive certification. In that regard, even Tocco conceded the reasonableness of the moratorium. Moreover, the length of time involved here was well within acknowledged expectations of how long the decisionmaking process may last. See *Hills Development, supra,* 103 *N.J.* at 39, 510 *A.*2d at 641-42. Consequently, there was no extraordinary delay in the constitutional sense occasioned by the Council's deliberations and, as the State court correctly noted, any fluctuation in property value during that time was an incident of ownership for which

no compensation was required.* (Pa15 to Pa17). This unremarkable and appropriate application of constitutional takings law to the circumstances of this case clearly does not require further review by this Court.

Nevertheless, Tocco claims in his petition that the development moratorium in fact denied him all use of his property. Each case must be examined on its particular facts to determine if government action has worked a taking. See *e.g., Kaiser Aetna v. United States*, 444 *U.S.* 164, 175 (1979); *Penn Central Transp. Co., supra*, 438 *U.S.* at 124 (ad hoc, factual inquiries); *United States v. Central Eureka Mining Co.*, 357 *U.S.* 155, 168 (1958) (question turns upon the particular circumstances of each case). A taking claim is premature, however, until use of an owner's land is actually forbidden. See, *e.g., Williamson Cty. Regional Planning v. Hamilton Bank*, 473 *U.S.* 172, 186-88 (1985). For example, in *Penn Central*, the Court held that a challenge to the application of New York City's Landmarks Preservation Law was not ripe because, although the responsible administrative body had denied a plan for a 50-story office building, the property owners had "not sought approval for a smaller structure." *Penn Central Transp. Co.*, 438 *U.S.* at 137. As a result, the Court was uncertain whether the administrative body would deny all economically

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* Significantly, there was no evidence whatsoever in the record below concerning the effect, if any, that the 18-month moratorium had on the value of Tocco's land. For this reason, there is no way to evaluate the economic impact caused by the moratorium. *Penn Central Transp. Co., supra*, 438 *U.S.* at 124. Therefore, the Court should assume Tocco's land could be put to reasonable use. See *Goldblatt v. Hempstead*, 369 *U.S.* 590, 594-96 (1962).

viable uses of the property and, consequently, if the property had in fact been taken in the constitutional sense. 438 *U.S.* at 136-37.

Likewise, in the present case, although he applied for and was denied an exemption from the moratorium, Tocco never asked the Council if it would allow him to build lower income housing.* Nor did he pursue limited exemptions to permit him to develop small portions of his land, relief the trial court here eventually allowed on remand from the Council. See, *e.g., Andrus v. Allard*, 444 *U.S.* 51, 65-66 (1979). Moreover, there is no evidence in this case that the moratorium interfered with Tocco's right to sell or otherwise dispose of his land. *Kirby Forest Indus., supra*, 467 *U.S.* at 15; *Agins, supra*, 447 *U.S.* at 262. In these circumstances, a development moratorium imposed to promote legitimate State interests that does not deprive a landowner of a fundamental attribute of ownership or economically viable use of his property cannot be considered a taking entitling him to compensation. Therefore, the opinion below is correct and presents no special and important reasons supporting further consideration by this Court.

This conclusion is not altered because Tocco asserts a "temporary" rather than a permanent taking. A temporary taking, which denies a landowner all use of his property, is not different in kind from a permanent taking. *First Lutheran Church, supra*, 482 *U.S.* at 318. Thus, the analysis used to determine if a taking – temporary or

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* It is inconceivable that the Council would interpret the restraints it imposed on the township to preclude the very use they were designed to preserve.

permanent – has occurred in the first instance does not differ depending on the permanency of taking alleged. The threshold question in both situations is whether the governmental regulation advances a legitimate State interest or deprives an owner of economically viable use of his land. *Agins, supra,* 447 *U.S.* at 260. Here, applying these established rules of constitutional analysis, the State court below concluded that the moratorium had not worked a taking, temporary or otherwise.

For like reasons, this case does not present the Court with "a great opportunity" (Pb15) to declare for the first time when a temporary taking occurs under federal law. Contrary to Tocco's assertion, there is nothing in *First Lutheran Church* to suggest that the Court was anxious to, but could not or chose on the record before it not to, devise a temporary taking test that departed from the settled criteria applicable to a permanent taking. See *e.g., Agins, supra,* 447 *U.S.* at 260. Rather, having assumed there was a taking, *First Lutheran Church* was limited to resolving what remedies were available to a landowner when government action had *already* resulted in a temporary taking. *Id.*, 482 *U.S.* at 322. Since no pertinent question was left open, there is no reason to revisit *First Lutheran Church* in this context.

Tocco's remaining argument is so absurd that it deserves only a brief response. He urges the Court to grant his petition on the ground that the New Jersey courts were "unsuited" to hear this case (Pb19; Pb16 to Pb24). Having declared in the first instance the constitutional obligation of communities to provide their fair share of lower income housing, the argument goes, the State courts cannot fairly decide a challenge to regulatory

actions designed to further the goals established in the *Mt. Laurel* cases. This argument must be rejected as just a desperate attempt by this unhappy litigant to divert the Court's attention from his insubstantial takings claim.

First, the trial court's decision on remand from the Council to continue the development freeze, contrary to Tocco's claim at pages 19 and 20 of his petition, serves to underscore rather than undercut the propriety and reasonableness of the Council's original development restraints. Second, there is no "conflict" (Pb22 to Pb24) between this Court's decision in *Nollan v. California Coastal Com'n*, 483 *U.S.* 825 (1987), and the New Jersey Supreme Court's decision in *Holmdel Builders Ass'n* because no takings claim was decided in that State court opinion. Moreover, even if a conflict existed between the two cited opinions, there is no conflict between *Nollan* and the Appellate Division decision below. Thus, the asserted conflict has nothing to do with this case and does not support this Court's exercise of discretionary review over the *Tocco* matter. See *Sup.Ct.R.* 10.1(c).

Finally, Tocco argues (Pb21) that the State's highest court, in declining to review this case, ignored allegedly controlling precedent in *Lomarch v. Englewood*, 51 *N.J.* 108, 237 *A.*2d 881 (1968). This argument is utterly meritless because *Lomarch* has no application to the present case. The one-year land development freeze invalidated in *Lomarch* affected only one landowner and it was not imposed to advance governmental interests in the exercise of the police powers. Instead, the freeze was designed solely to give the city more time to decide if it

wanted to buy the property subject to the freeze. Conversely, it is undisputed here that the development moratorium was imposed in the proper exercise of the State's police powers to preserve all scarce vacant land resources in Cherry Hill while the township's *Mt. Laurel* obligation was being reviewed by the Council. *Lomarch* is therefore inapplicable to this case, and the State courts properly chose not to consider it either instructive, persuasive or controlling.*

In conclusion, the State court opinion at issue applied well-established principles of takings law to the circumstances of this case and correctly concluded that the 18-month land development moratorium imposed to enable a municipality to satisfy its obligation under the State constitution to provide for its fair share of lower income housing did not work an unconstitutional temporary taking of Tocco's land. This unremarkable conclusion presents no special and important reason requiring further review by this Court and Tocco's petition for a writ of *certiorari* should therefore be denied.

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* Obviously, the New Jersey Supreme Court, which authored the opinion, was not troubled by any purported conflict between *Lomarch* and the Appellate Division's decision in this case since it declined to review the decision.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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